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Clerk.

No. 341.

Appeal from

Brief of Buck for D. C. (mo.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 341.

Filed Dec. 16, 1899.

ANTOINETTE THORMANN, PLAINTIFF IN ERROR,

vs.

ANDREW J. FRAME AND MAGDALENA FABACHER AND JACOB FABACHER MINORS, BY D. S. TULLAR, THEIR GUARDIAN *AD LITEM.*

MOTION TO DISMISS AND AFFIRM.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO "DISMISS AND AFFIRM."

T. E. RYAN,
Attorney for Executor in Error.
CHAS. F. BUCK,
Of Counsel and on Behalf of Legatees.
D. S. TULLAR,
Guardian ad Litem for Minors in Interest.

DISPATCH PRINT, WAUKESHA, WIS.

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MOTION TO DISMISS AND AFFIRM.

To the Honorable the Judges of the Supreme Court of the United States.

And now into this Honorable Court by their undersigned attorneys come Andrew J. Frame, Executor, and Magdalena Fabacher and Jacob Fabacher, minors, by D. S. Tullar their Guardian *ad litem*, Defendants in Writ of Error, and respectfully petition and move this Honorable Court to dismiss this cause on the ground that this Honorable Court, as appears on the face of the Record, is without jurisdiction *rationae materiae* or *personae* for the reasons:

First. That there is not involved in this case any issue of fact or law arising under the constitution or laws of the United States;

Second. That notwithstanding averment in the petition for Writ of Error (*Printed Record page 553*) that there is drawn in question the validity of any authority exercised under the laws of the United States and the decision of the State Supreme Court against its validity, the averment is not justified by the Record; and no such question appears on the face of the Record in any form by pleading or otherwise whatsoever;

Third. That the averment in said petition for writ of error and its repetition in various forms in the assignment of errors (*Printed Record pages 554 and following*) to the effect that the petitioners are advised and believe that the Court failed to give full faith and credit to a certain judgment

rendered by the Civil District Court for the Parish of Orleans Div. B. etc., does not raise any issue under the laws of the United States because it appears on the face of the judgment, that said judgment was limited to the fact of appointment of the plaintiff in error as administratrix of the succession of Joseph Fabacher in the state of Louisiana; and no issue is made anywhere as above set forth by pleading oral or written in the Record that this judgment was conclusive upon all the world or the parties litigant herein upon the question of the last domicile of the deceased; or that there was an adjudication on the question of domicile and that it operated as a bar to the courts of Waukesha County, Wisconsin, to entertain jurisdiction on the said question of the last domicile of the deceased and adjudicate thereon;

Fourth. That such issue was never presented except in argument on the final hearing of the cause in the Supreme Court, and the decision of the Supreme Court while considering the argument did not turn upon any Federal question but the court in express terms found the fact to be that "THE RECORD *(Printed Record page 568)* OF THE LOUISIANA COURT IN EVIDENCE MERELY SHOWS THAT THE CONTESTANT WAS AFTER APPROPRIATE PROCEEDINGS, APPOINTED ADMINISTRATRIX OF THE SUCCESSION OF THE DECEASED, AND THAT THE INVENTORY OF THE ESTATE THERE PRESENTED CONSISTED OF THE TOMB, ETC. THERE WAS NO ATTEMPT IN THAT COURT TO ADJUDICATE AS TO PROPERTY SITUATED IN WISCONSIN NOR AS TO THE DOMICILE OF THE DECEASED" ETC.

Fifth. Such contention, viz: That the judgment of the Louisiana Court appointing Plaintiff in Error Administratrix was in effect an adjudication upon the question of domicile of the deceased is in the nature of a plea of "*res adjudicata*" which should have been specially presented by plea; and such plea or contention is waived and abandoned where the Plaintiff in error herself, in terms, submitted by her pleadings the issue of fact as to the last domicile of the deceased without objection, bill of exception or reservation of any kind to the adjudication of court and jury as an original issue; and the Record shows that when the judgment, on which the contentions of "prior adjudication" was made in argument before the Supreme Court of the State of Wisconsin, was offered in evidence no plea or pretense orally or in writing was made that the object was to sustain a plea of "*res adjudicata*" and there is nothing to show that it was offered for any purpose whatsoever *except as proving facts tending to bear on the inquiry relative to the last domicile of Joseph Fabacher the deceased* then and there on trial before a jury.

And now without waiving the foregoing motion to dismiss

but persisting therein and urging same as well founded, your petitioners and movers availing themselves of the right under Rule 6, Paragraph 5 of the Rules of this Honorable Court, pray to combine with same this their motion to affirm the judgment herein on the ground that even if this Honorable Court should find that the Record shows or discloses that this Honorable Court has jurisdiction, it is manifest that the writ of error was taken for delay only and that the question upon which jurisdiction depends is so frivolous and so manifestly against plaintiffs in writ as not to need further argument.

And in support of this motion and as part thereof movers annex and refer to the printed briefs herewith filed.

Wherefore they pray that the motion to dismiss be granted and allowed and the Writ of Error dismissed for want of jurisdiction; but in the event that said motion be not allowed, that, for the reasons above set forth, the judgment of the lower court be finally affirmed, with costs, etc.; and for such other relief as the nature of the case may require and the law and practice of this Honorable Court permit.

T. E. RYAN,
for Executor—Dft. in Error.

CHAS. F. BUCK,
of Council and on behalf of Legatees, etc.

D. S. TULLAR,
Guardian ad Litem for Minors in interest.

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BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO "DISMISS AND AFFIRM."

To the Honorable the Judges of the Supreme Court of the United States.

I. ON THE MOTION TO DISMISS.

Expanding and elaborating the grounds upon which motion to dismiss Writ of Error in this cause is made, more in detail, we submit,—

First. That there is nowhere in the voluminous Record on file any plea or pleadings, or any note of any plea made orally or otherwise at any time except in argument in the Supreme Court of the State, making or presenting an issue of *res adjudicata*, or contending that the question of the last domicile of the deceased, Joseph Fabacher, had formed an issue in a judicial contention which had been passed upon in proper manner and with proper parties before a court of competent jurdisdiction, in a final judgment; and *Second.* That such judgment is conclusive upon the courts of the State of Wisconsin on the said question of the last domicile of the deceased.

Joseph Fabacher died on the 3rd of March, 1897, while temporarily in the City of New Orleans, leaving and having all of his worldly possessions movable and immovable in Waukesha County, Wis., except a family tomb which he had erected in the City of New Orleans, where he had lived for a long time and where no doubt at the time, he expected to die and be buried. There was some household furniture in a house in the city of New Orleans which was claimed to be his property but which as the record shows never came into the

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possession of the administratrix, appointed in the City of New Orleans, in *that* capacity. She sold her right, title and interest in it in her capacity *as heir* "to Lawrence Fabacher" at "private" sale. *(Printed Record page 455.)*

On the 27th day of March, 1897, A. J. Frame, one of the defendants in error, presented for probate in the County Court of said County of Waukesha, State of Wisconsin, the last will and testament of the deceased which he alleged had been duly executed in accordance with the laws of Wisconsin; and averment was made that said Joseph Fabacher was at the time of his decease "an inhabitant of the said county of Waukesha," etc. *(See Printed Record page 1.)*

This application was published according to law and set down for Tuesday, May 4th, 1897, for hearing. On said day and date Antoinette Thormann, Plaintiff in Error, duly appeared alleging herself to be under the law of Louisiana the "sole heir" of the deceased (Record page 3) and also setting forth a state of facts which if true would disqualify any and all the persons named in the testament, under the laws of Louisiana to take under the will, and with the express object of having said will and its effects judged according to the laws of Louisiana made issue as to the deceased's last domicile, averring that,—"*continuously ever since 1843 up to and at the time of his death he the said deceased was domiciliated in the City of New Orleans, State of Louisiana, and that as an inhabitant and resident thereof, that this court has no jurisdiction in the probate of said last will and testament and in the settlement or distribution of said estate of said deceased.*"

The will was also attacked on the ground of having been procured by "undue influence" etc., and as "not duly executed in the manner and form required by law."

These latter issues were not seriously urged at any time, and throughout, dealt with in a *pro forma* manner, and do not concern us now.

Thus a distinct and express issue was made upon the question of the domicile of the deceased Joseph Fabacher by the only person on earth, having an interest,—who now and for the first time in the course of this litigation, *in argument*, in the Supreme Court, contends that that one issue which she herself explicitly tendered had been determined by a prior adjudication and the Wisconsin Court had no power to judge on it. A trial was had in the County Court; the Judge of the County Court decided that at the time of his death and some time prior thereto Joseph Fabacher was domiciled in the city of Waukesha, County of Waukesha, State of Wisconsin. The case was tried in the month of August, 1897, and the decision rendered on or about the 1st of September.

In the meantime on the 30th of March, three days after the

Executor had filed the application for probate, Antoinette Thormann had filed her petition in the Civil District Court alleging substantially the same facts as in her petition of "contestation" herein and claiming to be appointed administratrix of the estate of Joseph Fabacher in the State of Louisiana. (See Transcript of this Record being Record of the succession of Joseph Fabacher, No. 52941, Civil District Court for the Parish of Orleans, Division B at pages 498 and following Printed Record.)

It was the usual *ex parte* application made in such cases and notice given by publication to persons desiring to oppose the application to do so within the time fixed. There being no opposition, judgment was rendered on the 30th day of April; four days therefore before Mrs. Thormann filed her "opposition" in the Waukesha court appointing her administratrix. The following is a full text of the judgment:

Letters.

STATE OF LOUISIANA.

Civil District Court for the Parish of Orleans Division B.

Succession of JOSEPH FABACHER No. 52941.

This shall certify to all whom it may concern that on the 30th day of March in the year of our Lord one thousand eight hundred and ninety-seven and the one hundred and 21 of the Independence of the United States of America an application was made to the Honorable Fred D. King judge of the civil district court for the Parish of Orleans Division B by Mrs. Antoinette Thormann, (born Fabacher) praying that she might be appointed administratrix of the succession of Joseph Fabacher.

Now know ye that Mrs. Antoinette Thormann (born Fabacher) has been and she is hereby appointed administratrix of the said succession of Joseph Fabacher, and that she has fulfilled all the requisites of the law.

Witness our hand and seal of the civil district court this 30th day of April in the year of our Lord one thousand eight hundred and ninety-seven and the one hundred and twenty-first of the Independence of the United States.

(Signed) FRED D. KING, Judge.
F. E. PETERSON, D'y Clerk.

A true copy,

F. E. PETERSON, D'y Clerk.

This is the judgment; the scope and effect of which is so well understood now in every state of this Union that the veriest tyro in practice could not be misled; which the plain-

tiffs in error assert determine judicially the last domicile of Joseph Fabacher, deceased, to be in the City of New Orleans, State of Louisiana; that the judgment to this effect is in the nature of a judgment *in rem* binding upon all the world, etc.

This judgment was final on the 30th day of April, 1897; four days before the petition of contestant is filed in the County Court of Waukesha. Yet no reference is made to it, and the issue of "domicile" is made to be tried as an original question of fact and law.

Under the motion to dismiss we submit to the Court,—*First*, that this contention is nowhere properly in the Record; and *Secondly*, that, if it might be held that the mere tender of the Record of the Louisiana Court in evidence brings in the judgment for every conceivable effect that it might have, and so collaterally raise that issue, that the point is in the nature of a plea of *res adjudicata*, and whether it should have been specially plead or not, *it was waived when plaintiff in error herself came into the Courts of Wisconsin*, and, as hereinabove set forth and shown in the Record, made a distinct and specific issue of fact and law between the parties to this suit on the question of the last domicile of Joseph Fabacher.

The case was tried, first before the County Court of the County of Waukesha as above stated; then before the Circuit Court in and for the County of Waukesha, with a jury. In both trials oral and written testimony making up a Record of 500 pages was heard and taken; and never throughout the case, in pleading or in argument, on the charge to the jury, or in exceptions to the findings, was the point ever suggested. It was first urged in argument in the Supreme Court of the State of Wisconsin.

The Record is not perhaps as carefully made up as it should be and we find for instance the exceptions to "findings of fact and conclusions of law" in it not less than three times: at pages 27, 379 and page 345. At page 382 Printed Record, we find the charge of the Judge of the Circuit Court to the jury. It is full and elaborate; goes into every detail of the case, and nowhere is there any point made on the effect of this judgment except in so far as the same may be considered as proving facts tending to show where the domicile of the deceased was. No objections were made at the time to the charge of the court—no request for a charge upon the point now urged; which, if well taken, should have terminated the cause. If the plaintiff thought the point was in the case she should have asked the court to charge that as matter of law the judgment of the Louisiana Court appointing an administratrix to the succession of Joseph Fabacher in the Parish of Orleans, State of Louisiana, was a decision upon the question of domicile conclusive as to all the world, and under the laws

and constitution of the United States binding upon the Courts of the State of Wisconsin.

Without objection, almost by consent, the following propositions were submitted to the jury *(See Printed Record page 386)*:

"The questions of fact submitted to you in this connection for your determination are as follows:

"First. Was the paper-writing presented for proof, allowance and probate as the last will and testament of Joseph Fabacher, deceased, executed in conformity with the provisions of the statutes of this state relating to wills?

"Second. Was the said alleged last will and testament of said Joseph Fabacher, deceased, his own voluntary act and deed, or was it the result and product of undue influence.

"Third. Was the domicile of said Joseph Fabacher, deceased, at the time of his death, the 3d day of April, 1897, at the City of Waukesha, County of Waukesha and State of Wisconsin, or was it at the City of New Orleans, State of Louisiana. And these questions of fact you must determine from the evidence in the case under instructions of the court."

These questions embody the gist, in fact, the entire issue of law and fact tried in the courts of Wisconsin.

We have already referred the Court to the exceptions filed by plaintiff in error to the finding of fact *"and conclusions of law"* after the judgment was rendered. They are elaborate and specifically embodied under seven distinct headings, *(Printed Record 345)* and it is sufficient to state that the point now contended for and first presented to the Supreme Court of the State of Wisconsin in argument, was not made. The point under discussion surely involves a "conclusion of law;" neither trial Court was ever given an opportunity to pass on it.

At page 405 Printed Record, your Honors will find the offer in evidence, of the Record No. 52941, Civil District Court, Parish of Orleans, State of Louisiana, and what transpired in connection wherewith as follows:

"Counsel for Contestant: I offer in evidence the Record in the Succession of Joseph Fabacher together with all the proceedings, No. 52941, Civil District Court, Parish of Orleans, division B.

"Objected to by proponent for the reason that it is an attempt on the part of the contestants to go into the Courts of Louisiana, alleging the domicile of the deceased was in Louisiana, and asking for letter of administration, when she is herself the contestant; in other words making evidence for herself after the death of Joseph Fabacher.

"By the Court: There was some property in that State. They would be entitled to administration upon that. I think we can assume the executor will go down and attend; pre-

sumptively it will give them the right to administration. I will let them put it in.

"Exception taken by proponent."

* * * * * * * *

"Counsel for Contestant: The next part of the Record shows that this administratrix filed a suit and took out what is called a writ of sequestration, claiming the estate, and gave the necessary bond. It shows there was sequestered a piano, table, cover, rocker, three chairs, etc."

"Objected to for the reason that the inventory is entirely an *ex parte* proceeding, not conclusive that those things were the property of Joseph Fabacher, and not conclusive in regard to any fact except that an administrator or the person pretending to act had taken an inventory and claims it was properly done."

"By the Court: *It is only received for this purpose—as tending or having a bearing, as they claim, on the question of domicile, in that it appears there were a great many household articles, etc., naturally used by a man who had a home there in New Orleans—the only object I will consider it for.*"

Your Honors will perceive that in the offer by counsel for plaintiff in error not a word is said on the question of domicile or that the Record and judgment were offered with the all controlling purpose embracing the whole case, as having the effect of barring further proceedings in the courts of Wisconsin and divesting them of jurisdiction on the question of domicile which it is now claimed was settled in that Record and by that judgment. And nothing said by them, although the Court distinctly admitted the Record "as having a bearing" as they claim, "*on the question of domicile.*"

We repeat therefore that the contention now made that the Court should have *ex proprio motu* and on its own suggestion without any claim or pretense in that respect by the plaintiff in error, arrested all further proceedings and held the question before it to have been previously determined,—should receive no sanction from this Court; and it should be held that such point should have been specifically presented in some form for the court of original jurisdiction to have acted upon it. Or, in any event, when the parties themselves made the issue of fact, tried it, and submitted it to a jury for final judgment, they should be held to have waived the point which they now make and must accept the consequences of the judgment which they themselves provoked.

Mrs. Antoinette Thormann, plaintiff in error, is the only person on earth who had any interest in the question before the court and when she herself as shown by her own pleadings and throughout the progress of two protracted and arduous trials asserted as an original and independent issue the fact

to be that Joseph Fabacher was domiciled in New Orleans, she cannot now be heard to say that that issue had been adjudged in her favor by a prior judgment in another state to which the defendants in error were neither constructively nor actually parties.

We submit therefore on this point, on the motion to dismiss, that the Federal question asserted in the petition for writ of error and assignment of errors, is not in this Record.

Second. But it will be contended by counsel for plaintiff in error that the Supreme Court of the State of Wisconsin did consider the point to be in the Record, passed upon it, and decided it adversely to their contention. But the contention obviously rests upon baseless *superstructure* having no foundation in any part of the Record, nor in the decision of the State Supreme Court. True the Supreme Court of Wisconsin, urged by the earnest insistence of counsel, *in argument*, discusses it; but manifestly, the decision does not involve a refusal to give full effect and validity to a judgment rendered in a Louisiana Court, determining the question of the domicile of Joseph Fabacher at the time of his death. On the contrary the Supreme Court found the fact to be *that no such judgment involving an issue of domicile had ever been rendered; that indeed no such issue was presented in the Record relied on.*

The opinion of the Supreme Court of Wisconsin is found at pages 560 and following, Printed Record. That portion of it which relates to this particular contention begins near the foot of page 566.

The Chief Justice, being the organ of the Court, with almost a degree of sensitiveness, resents the imputation that it might not be willing in a proper case as the Supreme Court of Wisconsin had always been, to give full faith and credit to public acts, records and judicial proceedings in Louisiana as well as every other State in the Union (see foot of page 567 *Printed Record.*) And decisions are cited in support of this very proper position. As the Court says, "These cases are cited to show that it has been and is the settled purpose of this Court to give full faith and credit to the public acts, records and judicial proceedings of other states. But to entitle a judgment under a court of another state to such full faith and credit in an action or proceeding *in rem* like the case at bar it must appear from the Record thereof that the Court rendering the same had jurisdiction of the subject matter or the proceedings (Authorities cited.)

Thus it is held in one of the cases cited that records and judicial proceedings of each state affecting property within it have in every other state a force and effect which they possess in the state of their origin; but as to similar property or estate situated in another state, they have no greater or

other force than similar records or proceedings in the courts of that state, citing *Robertson* vs. *Pickerell*, 109 U. S. 608.

"The Record of the Louisiana Court in evidence merely shows that the contestant was after proper proceedings appointed administratrix of the succession of the deceased and that the inventory of the estate thereof presented consisted of a tomb, etc. There was no attempt in that Court to adjudicate as to property situated in Wisconsin, *nor as to the domicile of the deceased;* that Court it may be conceded had jurisdiction as to any tangible property actually located in that state."

From this presentation of the case, and which springs logically from the nature of the judgment offered in evidence, is it not manifest that the Supreme Court of the State of Wisconsin did not refuse to give full faith and credit to a judgment by a Louisiana Court but it found the fact to be that while the judgment offered in evidence was perfectly valid to the extent that it appointed an administratrix to the property of the deceased in Louisiana and that the Court of Louisiana had full power to adjudge regarding such property, that there was not presented to the Court in Louisiana and was not adjudicated upon, the question of the last domicile of the deceased, nor any question affecting the disposition of property left by the deceased in the State of Wisconsin.

The jurisprudence of this Honorable Court leaves no room for doubt on the propositions submited, viz:

1st. That the Federal question should appear "in the Record."

2d. That it was decided by the Court.

3d. That the decision on the Federal point was necessary.

4th. That the judgment (of the State Court) was not placed on some other ground on which it might stand irrespective of the Federal question.

We refer the Court to the following cases as establishing these principles:

In the case of *White* vs. *Leovy*, 174 U. S. at page 95, this Court said: "It is manifest no Federal question was passed on by the Court. Its decision was upon an independent ground involving no Federal question and of itself sufficient to support the judgment. . . . . This was but the interpretation of written instruments, and if it were even apparent to us to be wrong, which we cannot say, we should nevertheless be without power to review it." And the Court quotes its decision in *Remington Paper Co.* vs. *Watson*, 173 U. S. 443, affirming *Eustis* vs. *Bolles*, 150 U. S. 361 and 370 where the Court said: "That when we find it unnecessary to decide any Federal question and when the

State Court has passed its decision on a local or state question our logical course is to dismiss the writ of error."

This latter case, *Eustis* vs. *Bolles*, is strongly in point, not only by reason of the principles and rules of this Court there laid down but by reason of an essential similarity in many respects. For instance we find in this case among other things, that even if it might be argued with some show of reason that a judgment appointing an administratrix of a deceased person to administer property left by the deceased in a particular state, determines the question of domicile, and that such judgment would be binding on the issue of domicile on the courts of other states, that the plaintiff in error had estopped herself from raising that issue, at the last moment in the Supreme Court of the State of Wisconsin when she herself by her own pleadings had made an issue of fact on such question of domicile, and which was tried there by the tribunal of original jurisdiction and decided against her.

In this case of *Eustis* vs. *Bolles*, the Supreme Court of Massachusetts had decided that a creditor of an insolvent estate who had proved his debt in insolvency, had thereby estopped himself from raising the Federal question, "that the act of the Massachusetts legislature under which the insolvency proceedings were had impaired the obligation of contracts" in violation of the Federal constitution. And this Court dismissed the appeal, saying among other things, besides what is above quoted: "That to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively not only that a Federal question was presented for decision by the State Court but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or constitution; or that the judgment as rendered could not have been given without deciding it. And the Court goes still further—It is said: "Where the Record discloses that if a Federal question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question not Federal has been also raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the judgment, then this Court will not review the judgment."

These "rules" there laid down are but a repetition and affirmance of the jurisprudence of this Court long since established and always adhered to, to the effect, "that where the decision of the State Court rested on a non-Federal question, this Court has no jurisdiction though there may also be a Federal question."

Adams & Co., et als., vs. *R. R. Co.*, 112 U. S. 123.
Crosby vs. *City of New Orleans*, 108 U. S. 105.
Kennebek R. R. Co. vs. *Portland R. R. Co.*, 14 Wall. 23.
Boughton vs. *Exchange Bank*, 104 U. S. 427.

"The allegation in the petition for writ of error that a Federal question is involved will not give jurisdiction, if in fact such question does not appear in the Record."—*Atty. General* vs. *Meeting House*, 1 Black, 162.

This Court must be clearly informed that a Federal question was presented for adjudication and decided by the State Court, otherwise it will not take jurisdiction. And this information must come to it from the Record itself.

In the case of *Susquehannah Boom Co.* vs. *West Branch Co.*, 110 U. S. 57, the Court said:

"Judgments of State Courts can be reviewed here only when the Federal question involved is raised in a manner to enable the Court by law to see that such question is necessarily involved in the decision. It is not sufficient to give this Court jurisdiction that the Federal question is raised by petition for a rehearing."

In *Warfield* vs. *Chaffe*, 91 U. S. 690:

"Where the Record does not show that a Federal question was raised though the petition for allowance of the writ of error alleges that such a question was relied upon, this Court has no jurisdiction. It must appear in the Record."

And finally in *Bowling* vs. *Lersner*, 91 U. S. 594:

"This Court cannot re-examine the judgment or decree of a State Court simply because a Federal question was presented to that Court for determination. It must appear that such a question was in fact decided or that its decision was necessarily involved in the judgment or decree as rendered.

The "Federal" question (?) was not brought in as we have shown until the argument of the case in the State Supreme Court and rests solely on a judgment appointing an *administrator* in Louisiana; which judgment was offered and received only in as far as tending to show facts bearing on the inquiry as to the last domicile of the deceased, and the Supreme Court of the State of Wisconsin taking note of the *argument*, answered it not by refusing to give the *judgment* effect, but by finding and announcing the fact to be that the question of the last domicile—which *it* was called on to decide, *was not an issue in the proceedings in which that judgment was rendered and was not concluded by that judgment.*

We respectfully submit therefore that the Record does not present a single one of the various conditions on which the jurisdiction of this Honorable Court to review the decision of a State Court, arises; and accordingly we pray the Court to maintain the motion to dismiss the case.

ARGUMENT ON THE MOTION TO AFFIRM.

Following upon what we firmly believe to be a complete demonstration—that this Court has no jurisdiction in this cause—it seems somewhat of a paradox to urge a motion "to affirm."

Much that might be said in support of the motion to affirm only emphasizes the argument in support of the motion to dismiss.

The bare statement of the proposition submitted on which the jurisdiction of this Court depends developes the meagre thread on which it hangs, in all its baldness.

As a matter of pleading the Court will find nothing. As evidence your Honors will find the judgment above referred to, Printed Record pages 498-499, with a ruling by the Court, at page 405, when it was offered "that that Record is admitted as showing facts tending to affect the issue of domicile" and no pretense made that that judgment concluded the inquiry on the issue of domicile—the only point of contention in the trial.

Looking at the decision of the Supreme Court of Wisconsin we find that it held that there was no adjudication on the issue of domicile in the Louisiana Court; that that Court simply being advised that there was property within its jurisdiction, appointed an *administratrix* to take charge of it, etc.

The laws and statutes of Louisiana are in evidence; the entire civil code of Louisiana was offered (*Printed Record page 493*); the Supreme Court of Wisconsin was therefore in a position to decide for itself what the "force and effect" under the laws of Louisiana, of such a judgment is—and it has said the issue of domicile of the deceased was not involved.

In order to have a tangible proposition before us therefore on the motion to affirm, we must assume that this Honorable Court will go behind and beyond that part of the decision of the Supreme Court of Wisconsin, which distinctly announces that it found in the Record no evidence of any judgment which passed on the evidence of domicile, and decide,

First. That there is in the Record proof of a judgment of a Louisiana Court determining the question of fact, of the last domicile of the deceased;

Second. Determining it in a manner to preclude the Wisconsin Court from entertaining and passing on any contention in regard to it as between the parties now before the Court.

Really as above stated, these views but confirm the contention that there is no "Federal question" in the case.

Setting all this aside the question urged is that a judgment of a Louisiana Court where it is conceded some property was found belonging to the deceased Joseph Fabacher appointing an administratrix to his estate (?) is a judgment *in rem* determining by implication the "last domicile" of the deceased as to all the world and precluding any further inquiry as to that fact in a proceeding instituted in the Courts of the alleged last domicile of a deceased in another state, for the purpose of obtaining probate of a will alleged to have been executed in accordance with the laws of the said state of last domicile!

We respectfully submit that this proposition, in the language of paragraph 5, rule 4, of this Honorable Court, is "so frivolous as not to need further argument."

The scope and effect of such judgments appointing administrators to deceased persons—wherever there is property,—is so well understood generally that nothing but the fact that counsel venture to seriously urge it to this exalted tribunal invests it with a surrounding to elicit like serious response.

Equally well understood is what the law means when it speaks of probate proceedings as being *in rem*. The *res* is the property of the estate: and the property being within the jurisdiction of the Court its sale or disposal by the administrator according to the law gives valid title. The appointment of the administrator is final and conclusive and his lawful acts binding on everbody. *Waple's* "proceedings *in rem:* Chapter,—"Probate Proceedings," Section 563, page 702.

Plaintiff in error may and will contend and it is the *soul* of their contention that the domicile of the deceased is essentially involved in a judgment appointing an administrator; if the court of "last domicile" were the only court having jurisdiction to appoint, —it might be argued with plausibility that domicile being essential to jurisdiction the judgment, by implication, determined it.

But in the first place domicle is not a factor; and in the second place, if it were, "jurisdictional facts" are always open to inquiry, Bigelow on Estoppel, 3rd Ed. 227, 235; Succession of Williams 3rd Ann., 261; Freeman on Judgments, Sec. 562 and 563; Rohrer on Interstate Law, page 107.

The proposition submitted seems literally too plain for discussion. When we reflect for an instant, on the far reaching effect such a conclusion would have, that the first creditor or any person having any interest rushing into any court of any state where a deceased person may have left an insignificant amount of property, by having himself appointed administrator for this property could conclude the whole world on the question of the "last domicile" of the deceased,—we must

understand at the same time, the utter futility of the contention. It is the "common law" of all civilized countries, which all states recognize, that personal property passes according to the laws of the place of domicile of the deceased. Then if the proposition contended for were true, it would be in the power of any one "taking time by the forelock" and having himself appointed administrator on an *ex parte* proceeding, to fix the domicile of the deceased, and thereby determine the law of descent and power of disposal by the deceased, of his own property.

Again, an administrator appointed by the Courts of any state has absolutely no power beyond the limits of that state; he is a mere officer of the Court to hold the property and collect the assets of the estate found within the jurisdiction of the Court and his power stops at the state line. This is an elementary proposition.

With what propriety or logic can it be contended that the appointment of such an officer establishes the domicile of the deceased as to all the world when it does not even give him control of any property or assets situated out of the limits of the state from the Courts of which he holds his appointment?

We hardly deem it necessary at this time to submit to your Honors the result of any elaborate research in support of the negative of a contention as original as it is impossible. It has however been decided that even a judgment probating a will does not determine the domicile of the deceased. We quote from page 149, Vol. 12, American & Eng. Encl. of Law:

"*Probate Decrees.*"—A decree of probate admitting a will to record does not conclusively establish the domicile of the testator as against all persons. *Whicher* vs. *Hume*, 7 H. L. Cas. 124; *DeMora* vs. *Concho*, 29 Ch. D. 268 (C. A.) It establishes the genuineness of the instrument as against the whole world. *Newman* vs. *Waterman*, 63 Wis. 612. But not the testamentary capacity of the testator, except as between the parties. *Brigham* vs. *Fayerweather*, 140 Mass. 411.

"The decrees of foreign Probate Courts within their jurisdiction are conclusive upon the admissibility of the instrument to probate and of the title derived from the issuance of letters testamentary and of administration. Big. on Estop. (4th Ed.) 237, and cases cited; *Williams* vs. *Saunders*, 5 Coldw. Tenn. 60; *Tomkins* vs. *Tomkins*, 1 Story U. S. 547; *Nelson* vs. *Oldfield*, 2 Vern. 76.

Bigelow also, at pages 13, 170 and 172, having laid down the general rule that the decrees of Courts of Probate and of like Courts upon the validity of testaments or upon the grant of letters of administration and like acts are conclusive when coming within its jurisdiction, qualifies at page 187 by saying:

"That an adjudication of a foreign Court (like that of a domestic) is conclusive only of matters without which the judgment could not have been pronounced." In other words if a judgment appointing an administrator could have been rendered without entering upon the question of the last domicile of the deceased, such judgment is not conclusive upon the question of domicile.

Finally on this point we submit to this Honorable Court Art. 935 of the Revised Civil Code of Louisiana which shows how and where successions are opened, and clearly lays down that they may be opened at places other than the last domicile of the deceased, *Art. 935 Revised Civil Code:* "The place of the opening of successions is fixed as follows:

"In the parish where the deceased resided, if he had a fixed domicile or residence in this state.

"In the parish where the deceased owned immovable property, if he had neither domicile nor residence in this state, or in the parish in which it appears by the inventory his principal effects are, if he have effects in different parishes.

"In the parish in which the deceased has died, if he had no fixed residence, nor any immovable effects within this state, at the time of his death."

This is the law of Louisiana which the Supreme Court of Wisconsin had before it when it correctly stated the import and the scope of this judgment appointing the Plaintiff in Error administratrix of the Succession of Joseph Fabacher in New Orleans, La.

Is not the Article so plain that he who runs may read?

The only thing we find in it on the question of domicile is in the first paragraph—the succession is opened,—"In the parish where the deceased resided if he had a fixed domicile or residence" etc.

An affirmation fraught with the negative that if he had no "fixed domicile" it might be opened elsewhere. And indeed the Article so provides.

If then, an administration may be founded wherever there is property,—without reference to "domicile" the argument that the "domicile" is involved and passed on by necessary implication, manifestly falls.

This question—as to the effect and scope of a judgment appointing an administrator—can be analyzed from an indefinite number of views, all illustrating its "limitations." For instance, the subsequent discovery of a will means the revocation of the administration proceedings.

Watson vs. *Glover*, 77 Ala. 233.
Kitridge vs. *Folson*, 8 N. H. 98.
Patton's Appeal, 31 Pa. St. 465.

To state another form:—instead of a judgment appointing an administrator being conclusive on the question of domicile —it is absolutely conclusive of nothing except the fact of appointment, and the appointment can even be collaterally questioned when the jurisdiction of the Court is involved.

Authorities are numerous, we submit as most directly in point:

Succession of Williams, 3 La. Ann. 261.

Beckett vs. *Selover*, 7 Cal. 233, *et seq.*

In both these cases the deceased died in the state where the Succession was opened:—

In both, the decedant had a fixed residence or domicile in a particular county (parish) in the state; in both so far as the state law goes the succession should have been opened in the county of domicile; in both it was opened and an administrator appointed in a county other than that of the domicile; in both, in collateral proceedings, these appointments were held null and the administration transferred or rather assumed by the Court of domicile.

Now the application: If the contention of plaintiff in error in this case is correct it must have followed that the judgment first rendered included and concluded the question of domicile; at least until set aside by direct proceedings assailing the jurisdiction of the Court.

The California case reasons out the situation so elaborately and so aptly that we quote from it as follows, page 23:

"An important controversy arose and the main contention was, whether the petition having stated the residence of the deceased its action in appointing the administrator judicially established the fact which could not thereafter be questioned in a collateral proceeding."

"The propo-ition is stated as follows by counsel: "*The allegation in the petition gave the Court jurisdiction, and it makes no difference whether the facts be true as alleged or not; the fact of residence is a jurisdictional fact in pais; and the Court necessarily passes upon and adjudicates said facts, and its decision, right or wrong, is conclusive in a 'collateral proceeding.'*

"The preponderance of authorities would seem to be clearly against the position of defendants counsel.

"No case, it is thought, can be found where administration was granted by a Probate Court of a wrong county, however regular may have been the proceedings, and those proceedings sustained anywhere, even when *collaterally* (Court's italics) 'assailed.'

"The reason upon which this doctrine rests would seem to be ample. It is the object of the law, that administration should never be granted until the death of the person, and

then only one administration within the state. The law is compelled to adopt some rule for determining where this grant should be made, and as the deceased could not have been a resident of two or more countries at the same time, the law makes his residence at the time of his death the test to determine the place where the grant should be made. These two facts must be alleged in the petition *and they must also be true in point of fact*, and if they do not co-exist in point of fact, the proceedings are utterly void; and the decision of the Probate Court on these jurisdictional facts is not conclusive upon any one not actually before the Court because the Court can compel no one to appear before it."

And at page 237:

"These proceedings are summary and special and must be in strict conformity with the law. It is apprehended that no one would insist that a judgment of administration before the death of a person, however regular could be sustained anywhere; 9 Texas R. 13: The decision of the Probate Court, that the man was dead would certainly not be conclusive against him; and the fact of residence is of equal importance to give the particular Court jurisdiction and the decision of one point is no more conclusive than the decision of the other."

It can be conceded in regard to both these cases that the Courts held that the appointment, made by Courts of a county other than that of domicile, were null and void; this would imply that "domicile" gave jurisdiction.

The answer is 1st. That the decisions involved conflict between Courts in the same state and the rule being that there can be but one administration in every sovereignty—if the deceased had a domicile within its territory—his succession as to that sovereignty must be opened at the Courts of domicile.

What we emphasize in these decisions is that they both directly negative the proposition contended for by Plaintiff in Error.

If a judgment appointing an administratrix in Louisiana is conclusive on the question of domicile—to bar inquiry on that in another state it can only be because such judgment is conclusive on that issue in the state where rendered; it is not expected that the Courts of Wisconsin should give a greater effect to a judgment rendered in Louisiana than it has in the state where rendered.

On this theory in the Succession of Williams, for instance, 3 La. Ann. 24, the judgment appointing Mrs. Williams administratrix of the estate of her husband in Livingston Parish should have been held to have determined the domicile of the deceased to be in that parish—at least until rescinded by a

"direct action" and have precluded the second appointment. But the Court,—as in the California case, attached no significance to the first appointment and acted on the second application in the parish of domicile without regard to it; precisely as we are now endeavoring to probate the will of the deceased in the Courts of the state of his last domicile.

These cases are direct in point and absolutely conclusive. To the same effect are *Garrett* vs. *Boenig*, 68 Fed. Rep. 51 and *Fletcher* vs. *McArthur*, 68 Fed. Rep. 65.

We think the foregoing, perhaps too excessive detail, covers, what should be said in this cause; yet this presentation is not entirely complete without something by way of anticipation on the line of argument we have reason to believe will be followed by the other side, and on the authorities which we may assume they will cite.

If we may be permitted to assume that counsel for Plaintiff in Error will continue on the lines of argument developed heretofore we may also know on what authorities they rely.

A simple inspection of the cases on which they have heretofore relied will expose the fallacy on which the whole argument is based.

The main cases relied on are:

Holmes vs. *Oregon & Cal. R. R. Co.*, *5th Fed. Rep. 523.*

Garret vs. *Boeing*, 68 Fed. Rep. 51.

Simmonds vs. *Saul*, 138 U. S. 439.

And two Louisiana cases: *Dusen* vs. *Dupre*, 32 La. Ann. 896 and *Cravenburg* vs. *Bradford*, 44 La. Ann. 418.

What do these cases decide? each and every one?

That the property of a succession is the *res:*

That such property sold under a proper proceeding by an administrator, confers title as to all the world which cannot be questioned collaterally nor perhaps directly, nothing more.

Simmonds vs. *Saul*, 138 U. S. 439, seems to be mainly relied on.

In that case the Court distinctly recognized (see syllabus) —the principle cited by us from Rorer, that "a judgment is only conclusive as to matters expressly decided or as to matters necessarilly implied."

And what was the issue in that case? The validity of a title to land acquired at a probate sale made by an administrator, under a special statute allowing a somewhat summary mode of proceeding in successions whose assets are less than $500 in appraised value.

The Court decided that under that statute an administrator could be appointed without bond; that the estate could be administered summarily and these "jurisdictional facts"

appearing in the Record, a sale by such an administrator conferred a valid title.

The case of *Garrett* vs. *Boeing*, 68 Federal Reporter 51 cited by counsel for defendant in support of the main proposition that the judgment of the Louisiana Court appointing this contestant administratrix is conclusive on the question of domicile not only absolutely does not touch upon that question but as far as it implies any effect to be given to the probate proceedings to the detriment of persons not party to them, is absolutely and distinctly against the proposition in support of which it is cited. It merely applies the doctrine of *Simmonds* vs. *Saul*, and holds that a sale by an administrator, jurisdictional facts appearing on the Record, cannot be collaterally attacked.

The very interesting case of *Holmes* vs. *Oregon and California R. R. Co.*, cited from 5th Federal Reporter, at page 523, also does not support the theory for which it is invoked. On the contrary it is in itself authority and cites authorities distinctly in support of the proposition that even the probate of a will while the jurisdiction of the Court to probate may be assumed, is not conclusive on the question of domicile. The case sprang from the construction of a statutory provision in the State of Oregon, to the effect that certain Courts had the exclusive power to grant letters of administration upon the estate "of a person who was or immediately before his death, was, an inhabitant of the county in which the Court is held. Under this statute it was held that a decree granting letters of administration by which it appears to have been adjudged upon proper petition that the deceased was an inhabitant of the county under the terms of the statute, was held conclusive as to the validity of the appointment and letters granted by the Court of any other county in the same state were held to be null and void. It appears from the decision at page 526 that in the discussion or argument of the case the administrator appointed in the last proceedings raised the question of domicile but the Court distinctly eliminated the issue by saying that "inhabitancy" and "domicile" are not equivalent terms and the question of domicile is not involved in the question whether a person be an "inhabitant" of a particular place. The distinction between this case and the proposition contended for by counsel for defendant is obvious. This is only the case of *Beckett* vs. *Selover*, 7 Cal. and Succession of Williams, 3 La. Ann. over again with the fact expressly emphasized, that the domicile of a deceased person is not involved in the appointment of administrators.

Nor do the Louisiana cases cited advance the situation for Plaintiff in Error.

They are mere repetitions of the universal principle upheld

in *Simmonds* vs. *Saul*. The syllabus of the case in 32 Ann. *Dusen* vs. *Dupre*, is "The legality of the appointment of a curator to a succession cannot be "inquired into collaterally as letters of administration make full proof of his capacity until his appointment is cancelled in a direct action." This is conceded to be good law—it is universal, but does not touch the question of domicile.

The case of *Grevenberg* vs. *James L. Bradford*, 44 Ann. 418, affirms what has been herein above stated, "That the order of sale of a Probate Court having jurisdiction protects the purchaser; he need not look beyond that decree."

Incidentally the case in 32 Ann., above cited and the case of *Simmonds* vs. *Saul*, in 138 U. S., are referred to by the Court.

As embodying a complete *resume* of the jurisprudence or rather of what the cases relied on by Plaintiff in Error establish and what they do not establish, we present *in extenso* the syllabus of *Grevenberg* vs. *Bradford*, 44 La. Ann. 418, as follows:

1. "A purchaser at a judical sale is not bound to look beyond the decree recognizing its necessity. The jurisdiction of the Court is an essential inquiry, but the truth of the record concerning matters within its jurisdiction cannot be disputed.

2. "A purchaser under a decree of a Probate Court is bound to look to the jurisdiction of the Court granting the order of sale. Such order is to be received as conclusive, and it is not to be impeached from within, but it is impeachable from without.

3. "A judgment, sentence, order or decree passed by a competent jurisdiction, which creates or changes a title, or any interest in an estate, is not only final as to the parties themselves and all claiming under them but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the Court adjudges it." Where in any of these cases do plaintiffs in error find that it has ever been held that a judgment appointing an administrator, *fixes* the *domicile* of the deceased for all purposes and against all the world.

Indeed, if this Honorable Court should take the view that it must go into the Record and beyond the "findings" of the Supreme Court of Wisconsin to the effect that in the proceedings in which Antoinette Thormann was appointed administratrix the issue of domicile was not made etc, and judge the effect of these proceedings as a question to be determined by this Court, then we submit to your Honors that under every principle of the American law of administration of the

estates of the dead, the proceedings instituted in the Louisiana Court by the Plaintiff in Error and her appointment as administratrix are absolutely null and void.

A succession is opened where the deceased had his domicile, or where there is property found subject to administration.

On the 30th of March, when Antoinette Thormann filed her petition in New Orleans, the petition for probate of the will had already been filed in the Wisconsin Court.

The domicile is conclusively established to have been in Waukesha.

Did the deceased have property in Louisiana subject to administration? No. Nothing is inventoried but a tomb, and that by express law is not property, not in commerce, and which can not be sold or mortgaged for debts, and obviously therefore can not serve to fraud administration.

Section 386 Revised Statutes of Louisiana provides:

"All public cemeteries for the purpose of interment with the monuments erected thereon, whether owned by religious or charitable corporations or associations, by municipal corporations *or by individuals*, shall be forever exempt from taxation and from seizure and sale for debt, and shall never be susceptible of mortgage, whether legal or conventional.

Woerner, in "The American law of Administration," 2nd Ed, Vol. 1, Sec. 204, an able and exhaustive treatise, discusses how and when and under what conditions administration may be had and states the general proposition thus:

"The rule in America is universal, that administration may be granted in any state or territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased; and that probate of the will of any deceased person may be granted in any state where he leaves personal or real estate."

And carrying out the logic to its proper results we find Sec. 205 page 471. That an administration by a court of a state of which the deceased was not a resident, is an absolute nullity unless there was property in the jurisdiction of the court.

To the same effect see *Fletcher* vs. *McArthur*, 68 Fed. Rep. 65; *Christy* vs. *West*, 38 Iowa 285; Rohrer on "Interstate Law" pp 249, 332.

See also *Atkinson* vs. *Rogers*, 14 La. Ann 633.

Possibly it is piling Pelion upon Ossa; possibly our zeal for our client and our sense of duty to the Court have impelled us to go into unnecessary details over old familiar ground, discussing propositions which ordinarily no one disputes, citing precedents where there has never been a contention, but we have done this to show that there is no question

"needing discussion" rather than *in* the discussion of the question.

We venture humbly to believe that this great tribunal will indeed declare that the proposition (in view of the law so well understood which defines how the estates of deceased persons in one or more states shall be administered) that an *ex parte* judgment of a court, even admitted to have jurisdiction by reason of property found within its control, appointing an administrator, in one state, is a judgment *in rem* as to the domicile of the deceased, binding on the world and conclusive to bar inquiry as to the facts in a court of another state, incidental to an application for the probate of the deceased's last will and testament, is so manifestly against the unbroken current of law, reason and established jurisprudence as not to "need further discussion;" and that a judgment bringing no other issue to this Court for adjudication should be summarily vindicated by affirmance.

And therefore we respectfully pray, if the motion to dismiss be not allowed, that the motion to affirm be maintained and a judgment of affirmance granted accordingly.

T. E. RYAN,
for Executor—Defendant in Error.

CHAS. F. BUCK,
of Counsel and for Legatees, etc.

No. 341.

FILED
DEC 27 1899
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

Brief of Tullar for D. S. (mo.)

OCTOBER TERM 1899.

No. 341.

Filed Dec. 27, 1899.

ANTOINETTE THORMANN, PLAINTIFF IN ERROR,

vs.

ANDREW J. FRAME AND MAGDALENA FABACHER AND JACOB FABACHER, MINORS, BY D. S. TULLAR, THEIR GUARDIAN *AD LITEM*, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT OF THE ABOVE NAMED GUARDIAN *AD LITEM*, IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

D. S. TULLAR,
Guardian ad litem for Magdalena Fabacher and Jacob Fabacher, minors interested.

DISPATCH PRINT, WAUKESHA.

SUPREME COURT OF THE UNITED STATES.

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BRIEF AND ARGUMENT OF THE ABOVE NAMED GUARDIAN *AD LITEM*, IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

To the Honorable, the Judges of the Supreme Court of the United States.

Now come the above named defendants in error Magdalena Fabacher and Jacob Fabacher, minor children of Joseph Fabacher, deceased, and appearing herein by D. S. Tullar, their guardian *ad litem*, submit the following:

[illegible] *em* fully concurs in and hereby adopts [illegible] t of the learned counsel for the executor [illegible] herein in support of said motion to dismiss, [illegible] hereby further concurs in and adopts the brief and argument of said same counsel in support of the motion to affirm.

In addition to the brief and argument so concurred in and adopted, said guardian *ad litem* hereby further submits:

The place of domicil of the deceased testator, Joseph Fabacher, at the time of his death, has been three times fully tried and determined by the State Courts in

Wisconsin. All parties interested were there before the Wisconsin Courts, fully represented by counsel, and the main question there litigated was as to the place of domicil of Joseph Fabacher at the time of his death. It was in and by said Wisconsin Courts, upon each of said three trials, judicially determined and adjudged that the domicil of Joseph Fabacher, at the time of his death, was at Waukesha, Wisconsin.

At the trial in the lower Courts in Wisconsin counsel for plaintiff in error offered in evidence a copy of a judgment of the Civil District Court of the Parish of Orleans, Louisiana, appointing plaintiff in error, upon her *ex parte* application, as administratrix of the succession of Joseph Fabacher deceased. Also copy of inventory and writ of sequestration from such Court. (Printed Record, pp. 498 *et seq.*) The offer of this evidence was made and the copies of said documents received in evidence for the sole purpose as having a bearing upon the question of domicil of the testator. No other object was claimed by counsel in the offer of such evidence in the trial Court. They first raised the point before the Supreme Court of Wisconsin, in their brief in that Court on appeal, that full faith and credit had not been given to such Louisiana judgment by the Wisconsin trial Court. This point had never been previously raised in the cause, either by plea, offer or objection.

In *Hanley* vs. *Donoghue*, 116 U. S. page 6, this Court holds that upon a presentation of a judgment rendered in one state to be given effect in another state, the effect to be given to such judgment must be determined by the laws of the state in which it was rendered; that this is matter of fact not to be judicially noticed without allegation and proof.

This seems to make conclusive and unanswerable our contention that some special pleading, declaration or offer should have been made in the trial Court based upon the fact of the existence and effect which such judgment has under the laws of the state where rendered. But conceding again that special pleading was not required, the fact remains that there is no evidence in the record to establish what the effect of such a judgment is in the State of Louisiana, except as that effect may be inferred from Art. 935 Revised Civil Code of Louisiana, defining where a succession may be opened.

True, the entire Civil Code of Louisiana was offered in evidence, but that code does not provide for the modes of practice, nor determine the effect to be given to judgments, nor regulate their execution. It does, under the provisions regarding successions, define the powers and duties of administrators. But there is nothing contained therein providing that a judgment appointing an administratrix deter-

mines any issue as to the actual fact of the place of domicil of the deceased.

And in this connection we further insist that the appointment of an administrator in Louisiana, in no sense involves the question of domicil of the deceased, and therefore the judgment of the Parish Court of Louisiana appointing the plaintiff in error as administratrix of the succession of Joseph Fabacher, deceased, cannot be said to determine the fact or question of the domicil of said deceased.

Counsel for plaintiff in error will undoubtedly contend that, under the laws of Louisiana, a judgment appointing an administratrix is conclusive on the question of domicil of the deceased, and yet it is distinctly provided in the Louisiana Code, under the heading "Of the successions of persons domiciliated out of the state," as follows: "Art. 1220. *The successions of persons domiciliated out of the State of Louisiana, and leaving property in this state at their demise, shall be opened and administered upon as are those of the citizens of the state; and the judge before whom such succession shall be opened shall proceed to the appointment or confirmation of the officer to administer it under the name and in the manner pointed out by existing law.*" Revised Civil Code of La., Art. 1220.

It will be noticed that this alleged Federal question was for the first time attempted to be imported into this case by the brief of counsel for plaintiff in error, before the Court of last resort in Wisconsin; and this was so attempted notwithstanding the issues in the case involved only the validity of the will of the testator and his place of domicil at the time of his death.

In *Cornell* vs. *Green*, 163 U. S. 80, this Court say: "It is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the 5th section of the Act of March 3d, 1891."

Referring to the opinion of the Supreme Court of Wisconsin (Record page 560 *et seq.*,) it will be readily seen that the main question that Court was called upon to decide, and which it did decide, was the question of fact as to the domicil of the testator.

That Court being requested by counsel for plaintiff in error to notice their point as to the alleged Federal question, for the first time there raised in their brief, did notice it in its

opinion and discussed it fully. But as will be seen the decision of the Wisconsin Supreme Court is one of *affirmance of the judgment of the Court below*, where the Federal question was not raised or hinted at. The judgment, therefore, brought in question in this Court by this writ is one resting upon the independent ground of *domicil of the testator* and the *legality of his will*, and does not involve a Federal question at all.

"Where a State Court, in rendering a judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this Court will dismiss the writ of error without considering the Federal question."

Rutland R. Co. vs. *Central Vt. R. Co.*, 159 U. S. 630.

Gillis vs. *Stinchfield*, 159 U. S. 660.

Seneca Nation vs. *Christy*, 162 U. S. 283.

Bacon vs. *State of Texas*, 163 U. S. 228.

It is also said in *Kennebeck & P. R. Co.* vs. *Portland & K. R. Co.*, 81 U. S. 23, "This Court will not entertain jurisdiction of state judgments where, beside the Federal question decided by the State Court, there is another and distinct ground on which the judgment can be sustained." See also *Rector* vs. *Ashley*, 73 U. S. 142.

And again in *Brooks* vs. *Missouri*, 124 U. S. 394, it is said: "Where a state decision of an alleged Federal question was not necessary to its judgment, but the Court also put its decision upon another ground not repugnant to the Federal laws or constitution, the United States Supreme Court has no jurisdiction."

A real, not a fictitious Federal question is essential to the jurisdiction of this Court over the judgments of State Courts.

Hamblin vs. *Western Land Co.*, 147 U. S. 532.

The record in this case shows conclusively that the actual domicil of Joseph Fabacher at the time of his decease was at Waukesha, Wisconsin. This having been duly adjudged and determined as a fact by the State Courts of Wisconsin where that question was fully litigated, will not be further questioned by this Court.

"No point has been more repeatedly and more authoratively settled than that this Court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the Court below, and as they are exhibited by the record."

Dower vs. *Richards*, 151 U. S. 666.

The domicil of said testator, Joseph Fabacher, at the time of his death, having been thus judicially determined to be at Waukesha, Wisconsin, it necessarily follows that the domicil of his minor children Magdalena and Jacob, was the same. Yet it is contended by counsel for the plaintiff in error that the judgment of the Parish Court of Louisiana appointing the plaintiff in error as administratrix of the succession of said deceased, is binding upon such minors domiciled in Wisconsin, without notice, and without the showing of any appointment or appearance of a guardian or other person to represent them in such Louisiana Court.

We contend that such judgment of appointment of said administratrix in and by said Louisiana Court, under such circumstances, is in no respect binding upon said minors domiciled in Wisconsin.

In the Wisconsin courts, on the other hand, when the first appearance and application for probate were made by the executor named in the will of said deceased, to-wit, on March 27th, 1897, the County Court for Waukesha County, Wisconsin, duly made an order appointing the undersigned as guardian *ad litem* for said minors, Magdalena and Jacob Fabacher, "for the sole purpose of appearing for them and taking care of their interests in the proceedings on said application." (Printed Record, page 3.) And the Record fully discloses that in all the proceedings thereafter had in the Wisconsin courts, said minors were present and represented by their said guardian.

Upon this state of the Record in this cause, said minors respectfully submit, through their undersigned guardian *ad litem*, that as to them there is no Federal question presented by this record, and none necessary to be decided. That the lower courts of Wisconsin having based their decision upon the question of domicil of the deceased and the validity of his will, and the Supreme Court of said state having merely affirmed such decision, it is entirely unnecessary for this Court to decide any Federal question, and under the rule of this Court in *Bacon* vs. *State of Texas*, 163 U. S. 228, and the cases there cited, the logical conclusion of this Honorable Court should be to dismiss the writ. And said minors, by and through their undersigned guardian *ad litem*, would therefore pray this Court to grant their motion and dismiss the writ of error.

D. S. TULLAR,

Guardian ad litem for Magdalena Fabacher and Jacob Fabacher, minors interested.